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America: Land of the Shackled

Lauren Martin

Belmont University - College of Law

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AMERICA: LAND OF THE SHACKLED

LAUREN MARTIN

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I. INTRODUCTION

When Elizabeth Warren, United States Senator for Massachusetts, ran into Gavin Newsom, the Lieutenant Governor of California, on her way to discuss the Dignity for Incarcerated Women Act,¹ his response was representative of the majority of reactions she gets when she mentions the bill: “What? They do that?”² The Dignity Act, a bill that was introduced in Congress on July 11, 2017, “would make a series of common-sense reforms to

¹ S. 1524, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1524/text>.

² C.J. Ciaramella, *Bill Introduced in Congress to Ban Shackling and Solitary Confinement of Pregnant Women*, REASON.COM: HIT & RUN (July 11, 2017, 5:30 PM), <http://reason.com/blog/2017/07/11/bill-introduced-in-congress-to-ban-shack>.

how the federal system treats incarcerated women.”³ One such reform includes a ban on the use of restraints on pregnant inmates.⁴ Although at first blush it may seem like an archaic practice, the shackling of pregnant inmates, even during labor, continues to be a problem in the United States.

Despite adverse rulings by several courts, the practice of shackling pregnant inmates persists, forcing women who were pregnant and subjected to the use of restraints to litigate the issue in hopes of restoring their dignity and attaining compensation for lingering injuries caused by shackling.⁵ As established by the courts, shackling pregnant inmates constitutes a condition of confinement in violation of the Eighth Amendment prohibition against cruel and unusual punishment.⁶ Several states have been proactive in enacting anti-shackling legislation,⁷ and a bill has recently been introduced in Congress which would ban the practice in federal prisons.⁸ However, despite adverse court rulings and a few state statutes, the practice persists in those places that do not have legislation in place to protect these women’s rights.⁹ For this reason, it is necessary that both the federal government and state governments enact legislation banning the practice, so that this human rights violation might be eradicated, and so that the United States might be worthy of its reputation as the land of the free.

This Note will demonstrate the detrimental effects of shackling a pregnant woman and will examine some of the efforts currently being made to prohibit the practice, as well as provide some suggestions for prohibitory legislation. Part II of this Note will discuss the background of this pervasive issue, both how it has been viewed by the courts and the ways in which it has been dealt with

³ *Senators Booker, Warren, Durbin, Harris Introduce Landmark Bill to Reform the Way Women Are Treated Behind Bars*, ELIZABETH WARREN: U.S. SENATOR FOR MASS. (July 11, 2017), https://www.warren.senate.gov/?p=press_release&id=1727.

⁴ *Id.*

⁵ See *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563 (6th Cir. 2013); *Nelson v. Corr. Med. Sers*, 583 F.3d 522 (8th Cir. 2009); *Brawley v. Washington*, 712 F. Supp. 2d 1208 (W.D. Wash. 2010); *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia, et al.*, 877 F. Supp. 634 (D.D.C. 1994).

⁶ See cases cited *supra* note 5.

⁷ AZ, CA, CO, DE, D.C., FL, HI, ID, IL, LA, ME, MD, MA, MN, NV, NM, NY, PA, RI, TX, VT, WA, WV. 2017 ACOG State Legislation Tally, Am. Cong. of Obstetrics and Gynecology, <https://www.acog.org/-/media/Departments/State-Legislative-Activities/2017ShacklingTally.pdf?dmc=1&ts=20171029T2052480513>.

⁸ S. 1524, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1524/text>.

⁹ *Martin v. County of Milwaukee, et al.*, No. 2:14-cv-00200 (E.D. Wis. 2014) (occurring in a state which, even in 2017, has not enacted anti-shackling legislation).

by state legislatures that have enacted anti-shackling laws. Part III of this Note will analyze the positions of those who support a ban on the use of restraints on pregnant inmates and detainees. Part III will also address *Martin v. County of Milwaukee*, a case tried in July of 2017 which concerns issues central to this Note. Part IV will demonstrate the necessity of anti-shackling legislation and present suggestions for legislators to consider when enacting a statute of this kind.

II. BACKGROUND

A. Case Law

There are four major cases addressing shackling of pregnant women: *Women Prisoners of the D.C. Department of Corrections v. District of Columbia, et al.*¹⁰; *Nelson v. Correctional Medical Services*¹¹; *Brawley v. Washington*¹²; and *Villegas v. Metropolitan Government of Nashville*.¹³ These cases are important in understanding how this issue has progressed through the courts and in establishing a base knowledge of existing precedent, which holds that shackling is a violation of the Eighth Amendment to the Constitution of the United States, and is thus a violation of basic human rights.

In order to establish an Eighth Amendment claim, plaintiffs are required to meet a relatively high bar. The courts have held that in order to prevail on an Eighth Amendment claim of cruel and unusual punishment, an inmate must satisfy a two-part test involving both an objective prong and a subjective prong.¹⁴ The first prong, the objective analysis, asks “whether shackling pregnant detainees in the manner and under the circumstances in which Plaintiff was shackled creates a substantial risk of serious harm that society chooses not to tolerate.”¹⁵ In other words, “the shackling of pregnant detainees while in labor [must] offend[] contemporary standards of human decency such that the practice violates the Eighth Amendment’s prohibition against ‘cruel and wanton infliction of pain’...”¹⁶ The courts recognize that prison is not intended to be “comfortable,” so “only those deprivations denying the minimal civilized measure of life’s necessities are sufficiently grave to form

¹⁰ See *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia, et al.*, 877 F. Supp. 634 (D.D.C. 1994).

¹¹ *Nelson v. Corr.l Med. Servs*, 583 F.3d 522 (8th Cir. 2009).

¹² *Brawley v. Washington*, 712 F. Supp. 2d 1208 (W.D. Wash. 2010).

¹³ *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563 (6th Cir. 2013).

¹⁴ *Id.* at 571.

¹⁵ *Id.*

¹⁶ *Id.* at 574.

the basis” of a Plaintiff’s claim.¹⁷ As to what exactly constitutes a contemporary standard of decency, the courts will look to expert opinion, “but such information does not define the ‘constitutional minima’ and ‘cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction.’”¹⁸

The second prong, or the subjective portion of the analysis, asks “whether the officers had knowledge of the substantial risk, recognized the serious harm that such a risk could cause, and, nonetheless, disregarded it.”¹⁹ Thus, the plaintiff asserting an Eighth Amendment claim for shackling during pregnancy must establish “that prison officials acted with ‘deliberate indifference’ to inmate health or safety.”²⁰ There are several ways an inmate might prove deliberate indifference on the part of prison officials. For example, a plaintiff may introduce “circumstantial evidence” which could allow a jury to find that “a prison official knew of a substantial risk from the very fact that the risk was obvious.”²¹ In addition, a plaintiff may demonstrate that “the risk was ‘longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus ‘must have known’ about it.”²² Although it is possible for a prison official to claim ignorance, he or she “may not refuse to investigate facts or inferences that he strongly suspects indicate the existence of a condition which violates the Eighth Amendment.”²³

i. Women Prisoners

Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia, which was certified as a class action in December of 1993, was brought by and representative of “all women prisoners who are incarcerated in the District of Columbia correctional system as of October 1, 1993, and all women prisoners who will hereafter be incarcerated in the D.C. correctional system.”²⁴ The class alleged many different forms of abuse against the D.C. correctional system, including shackling pregnant inmates during pregnancy, labor, and postpartum recovery.²⁵ One such inmate, identified as Jane Doe L, was forced to give birth in her jail cell after jail officials refused to

¹⁷ *Women Prisoners of the D.C. Dep’t of Corr.*, 877 F.Supp. at 663.

¹⁸ *Id.* at 664.

¹⁹ *Villegas*, 709 F.3d at 575.

²⁰ *Women Prisoners of the D.C. Dep’t of Corr.*, 877 F.Supp. at 664.

²¹ *Id.* at 664.

²² *Id.*

²³ *Id.*

²⁴ See *Women Prisoners of the D.C. Dep’t of Corr.*, 877 F.Supp. at 638-39.

²⁵ *Id.* at 646-47.

transport her to the hospital, despite the fact that her contractions were a mere five minutes apart.²⁶ Almost immediately after she delivered her baby, “guards placed her in handcuffs and leg shackles and sent her by ambulance” to the hospital.²⁷

In examining the case, the court found additional evidence of the use of restraints on pregnant inmates.²⁸ For example, “[a] physician’s assistant stated that even when a woman is in labor ‘their ankles and their hands are cuffed.’”²⁹ It was also common practice to restrain pregnant inmates by means of “leg shackles, handcuffs and a belly chain with a box that connects the handcuffs and the belly chain” while transporting them to medical appointments.³⁰

Presented with these facts, the court found that shackling pregnant inmates while in labor and during postpartum recovery was inhumane, and thus a violation of 42 U.S.C. § 1983 and the Eighth Amendment.³¹ In particular, the court held that these practices “violate[d] contemporary standards of decency.”³² However, the court did limit its finding by stating that instances in which a woman had a history of escape or assault may qualify as acceptable reasons for shackling.³³ In addition, the court only took issue with shackling during labor and immediately following.³⁴ It found no problem in utilizing leg shackles during the third trimester of pregnancy, but did state that “the physical limitations of pregnancy and the pain involved in delivery make complete shackling redundant and unacceptable in light of the risk of injury to a woman and baby.”³⁵

ii. *Nelson*

Shawanna Nelson had, to say the least, a harrowing experience as a woman who was pregnant when arrested and delivered her child while incarcerated.³⁶ When the time came to deliver her child, Nelson was shackled during transport to the hospital, her legs were shackled to the wheelchair upon arrival, and both of her ankles were shackled to her hospital bed.³⁷ By the time she was given a hospital bed, Nelson’s cervix was dilated to 7 centimeters, meaning she was in the final stages of labor when her

²⁶ *Id.* at 646.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 668-69.

³² *Id.* at 668.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 524 (8th Cir. 2009).

³⁷ *Id.* at 525.

ankles were shackled to both sides of her hospital bed.³⁸ Each time a nurse came to measure her cervix, her shackles were removed and then replaced as soon as the nurse had finished.³⁹ Nelson was forced to endure all of this despite the fact that she “did not present a flight risk or any other security concern.”⁴⁰ In fact, “[the Officer’s] own testimony indicate[d] that she was aware that shackling a woman in labor was hazardous and contrary to medical needs.”⁴¹ Nelson’s shackles were finally removed just before she was taken to the delivery room, but only at the doctor’s request.⁴² Nelson alleged that being shackled before, during, and after labor caused severe repercussions, including: extreme mental anguish and pain, permanent hip injury, torn stomach muscles, an umbilical hernia requiring surgical repair, damage to her sciatic nerve, injured and deformed hips, inability to sleep or bear weight on her left side or sit or stand for extended periods, and inability to have more children.⁴³

Interestingly, the Arkansas Department of Corrections had policies in place which should have suggested to the officers that shackling Nelson was inappropriate.⁴⁴ For instance, “Administrative Regulation 403 ... stated the ADC policy that shackles were to be used ‘only when circumstances require the protection of inmates, staff, or other individuals from potential harm or to deter the possibility of escape.’”⁴⁵ In addition, “any officer responsible for transporting an inmate to a hospital [was required] to ‘use good judgment in balancing security concerns with the wishes of treatment staff and the medical needs of the inmate’ before shackling an inmate during a hospital stay.”⁴⁶ Yet, despite these policies, the officers shackled Nelson, and, as a consequence, she sustained serious permanent injuries.⁴⁷

In reviewing Nelson’s case, the court first examined whether the officer who shackled Nelson had acted with deliberate indifference.⁴⁸ The court found that the Officer should have been aware of the risk of harm to Nelson and her unborn child.⁴⁹ This, coupled with the Officer’s own testimony that she would not shackle a pregnant woman due to the possibility of adverse health

³⁸ *Id.*

³⁹ *Id.* at 526.

⁴⁰ *Id.* at 534

⁴¹ *Id.*

⁴² *Id.* at 526.

⁴³ *Id.*

⁴⁴ *Id.* at 527.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 526.

⁴⁸ *Id.* at 528.

⁴⁹ *Id.* at 529-531.

consequences, was central to the court's determination that the Officer had acted with deliberate indifference.⁵⁰

Next, the court considered whether the constitutional right which Nelson asserted was established at the time the event at issue took place.⁵¹ Not only did the court find that Nelson's right to be free from restraints during pregnancy, labor, and delivery had been clearly established by lower courts, it also found that it had been acknowledged by the Supreme Court of the United States.⁵² In making this determination, the court considered several cases, including *Women Prisoners*.⁵³ The court reasoned that because the federal district court's decision regarding the use of restraints on pregnant inmates in *Women Prisoners* had not been appealed by the government, a constitutional violation in such a case had been clearly established.⁵⁴ Accordingly, with both the deliberate indifference element and the clearly established right element of the offense satisfied, the court held that Nelson's Eighth Amendment right to be free from cruel and unusual punishment had been breached.⁵⁵

iii. *Brawley*

In 2006, Casandra Brawley was incarcerated in the Washington State Corrections Center for Women.⁵⁶ At the time, she was five months pregnant.⁵⁷ Each and every time Brawley was taken to a prenatal medical appointment, "she was placed in full restraints," which included "a metal chain around her waist [with] her hands [...] handcuffed together, and the handcuffs were attached to the waist chain."⁵⁸ Although the Officer who transported Brawley to the hospital when she went into labor admitted she did not consider her a security risk, Brawley was placed in handcuffs and a waist chain, with the two restraints attached.⁵⁹ When Brawley was given a hospital room, the chain and handcuffs were taken off, but the officers chained one of her ankles to her hospital bed.⁶⁰ When she was moved to a delivery room, Brawley's ankles were chained to her wheelchair.⁶¹ She was unchained and then re-chained after her

⁵⁰ *Id.*

⁵¹ *Id.* at 531.

⁵² *Id.* at 533.

⁵³ *Id.* at 532-533.

⁵⁴ *Id.* at 533.

⁵⁵ *Id.* at 534.

⁵⁶ *Brawley v. Washington*, 712 F. Supp. 2d 1208, 1211 (W.D. Wash. 2010).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1212.

⁶⁰ *Id.* at 1213.

⁶¹ *Id.*

epidural, and her restraints were finally removed just prior to her emergency cesarean operation.⁶² After her surgery, her ankle was again chained to the bed.⁶³ Even when Brawley was taken to the NICU to see her newborn child, she was chained to her wheelchair.⁶⁴

Perhaps one of the most troubling portions of Brawley's experience occurred when her newborn son was in a bed in her hospital room and began to make choking or vomiting noises.⁶⁵ Had she been free, Brawley could have quickly gotten up from her bed and administered the help the infant clearly needed.⁶⁶ But since Brawley was chained to her bed, her only option was to call for help and trust a nurse would arrive in time.⁶⁷

The court found that Brawley had indeed been forced to "endure[] unnecessary pain, was exposed to a sufficiently serious risk of harm, and had a serious medical need when she was shackled to the hospital bed...."⁶⁸ Further, the court held that "Common sense, and the DOC's own policy, tell us that it is not good practice to shackle women to a hospital bed while they are in labor."⁶⁹ In other words, it should have been *common sense* not to shackle a pregnant woman in labor. Thus, the first element of the court's analysis, that Brawley had a serious medical need, had been clearly satisfied.⁷⁰

In examining whether Brawley's right to be free from restraints during labor was an established constitutional right, the court found that "by April of 2007 shackling inmates while they are in labor was clearly established as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment."⁷¹ That is, by the time Brawley experienced this treatment, her right to be free from such degrading practices had been clearly established and was protected by the Constitution.⁷² Despite this, Brawley, like others both before and after her, was forced to endure this violation of her basic human rights.

iv. *Villegas*

Juana Villegas was nine months pregnant when she was arrested for driving without a driver's license and then detained

⁶² *Id.* at 1213-1214.

⁶³ *Id.* at 1214.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1219.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1220.

⁷¹ *Id.* at 1221.

⁷² *Id.* (citing *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 533 (8th Cir. 2009)).

when it was found that she did not have adequate immigration documentation.⁷³ Just two days after being booked into the jail, Villegas went into labor.⁷⁴ She was transported to the hospital in handcuffs and leg restraints.⁷⁵ Upon arrival at the hospital, her handcuffs were taken off, but one of Villegas' legs was shackled to her hospital bed.⁷⁶ One of the nurses told the officer that Villegas should not be restrained, but the officer ignored her.⁷⁷ Villegas was un-shackled and re-shackled at multiple points throughout both labor and postpartum recovery.⁷⁸

The court, like others, evaluated Villegas' case using a combination of conditions of confinement and serious medical needs analyses.⁷⁹ The court found both that shackling posed a risk of harm to Villegas and that "the shackling of pregnant detainees while in labor offends contemporary standards of human decency such that the practice violates the Eighth Amendment's prohibition against the 'unnecessary and wanton infliction of pain'..."⁸⁰ Thus, Villegas' right to be free from cruel and unusual punishment had been violated. However, the court held that "...the right to be free from shackling during labor is not unqualified."⁸¹ In so finding, the court listed two exceptions: (1) restraints may be used if the inmate posed a flight risk; and (2) restraints may be used if the inmate poses a substantial risk of harm to herself or others.⁸²

B. State Legislation

Thus far, only 22 states and the District of Columbia have adopted legislation banning the practice of shackling pregnant inmates.⁸³ The American College of Obstetrics and Gynecology has listed six areas which it suggests states address in enacting this type of legislation.⁸⁴ These are:

1. Broadly restrict restraints during labor, delivery, postpartum and transport to a medical facility;
2. Allow medical personnel to have restraints

⁷³ Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 566 (6th Cir. 2013).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 567.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 571.

⁸⁰ *Id.* at 574.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *supra* note 7.

⁸⁴ *Id.*

removed immediately;

3. Require written documentation by corrections personnel of the use of restraints;
4. Apply to juveniles;
5. Require corrections personnel to remain outside delivery room for privacy concerns; and
6. Address additional health concerns of pregnant inmates (including adequate prenatal care, appropriate maternal nutrition and nutrition counseling, HIV and substance screening and treatment).⁸⁵

Each state with legislation limiting the use of restraints has addressed the first category in its coverage.⁸⁶ However, fewer states cover fewer categories as the list continues.⁸⁷

In 2010, The Rebecca Project for Human Rights and the National Women's Law Center partnered to create a state-by-state report card reviewing several aspects of reproductive care provided to incarcerated women.⁸⁸ One of the areas reviewed was the use of restraints during pregnancy. At the time of the report, only ten states had adopted laws addressing shackling.⁸⁹ The report found that thirty-six states had failed to "comprehensively limit, or limit at all, the use of restraints on pregnant women during transportation, labor and delivery and postpartum recuperation."⁹⁰ Of the states lacking any statute dealing with the practice of shackling, "[t]wenty-two states either have no policy at all addressing when restraints can be used on pregnant women or have a policy which allows for the use of dangerous leg irons or waist chains."⁹¹ Equally as shocking, "eleven states either allow any officer to make the determination [to use restraints for security reasons] or do not have a policy on who determines whether the woman is a security risk."⁹² Perhaps most unsettling of all, "[t]hirty-four states do not require each incident of

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Mothers Behind Bars: A state-by-state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children*, Nat'l Women's L. Center (Oct. 2010), <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.

⁸⁹ *Id.* at 6.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 7.

the use of restraints to be reported or reviewed by an independent body.”⁹³

One aspect of policies against restraining pregnant women that seems to be shared by the courts, by advocates of anti-shackling legislation, and by the states, is the inclusion of exceptions to a prohibition of the practice.⁹⁴ In general, these exceptions are: (1) restraints may be used if the woman poses a significant risk of harm to herself or others; and (2) restraints may be used if the woman poses a flight risk. For example, New Mexico’s statute regarding shackling pregnant inmates states:

“A. An adult or juvenile correctional facility, detention center or local jail shall use the least restrictive restraints necessary when the facility has actual or constructive knowledge that an inmate is in the second or third trimester of pregnancy. No restraints of any kind shall be used on an inmate who is in labor, delivering her baby or recuperating from the delivery unless there are compelling grounds to believe that the inmate presents:

- (1) an immediate and serious threat of harm to herself, staff or others; or
- (2) a substantial flight risk and cannot be reasonably contained by other means.

B. If an inmate who is in labor or who is delivering her baby is restrained, only the least restrictive restraints necessary to ensure safety and security shall be used.”⁹⁵

Thus, states consider exceptions to a blanket prohibition on the use

⁹³ *Id.*

⁹⁴ See *Nelson*, 583 F.3d at 533; *Villegas*, 709 F.3d at 574; G.A. Res. 70/175, annex, at 48(2), Nelson Mandela Rules, (Dec. 17, 2015); *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, Comm. Op. No. 511, at 4, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (2011), <https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females>; *An “Act to prohibit the shackling of pregnant prisoners” model state legislation*, AM. MEDICAL ASSOC. (2015), <https://www.ama-assn.org/sites/default/files/media-browser/specialty%20group/arc/shackling-pregnant-prisoners-issue-brief.pdf>; N.M. Stat. Ann. § 33-1-4.2 (West); Tex. Gov’t Code Ann. § 501.066 (West); Tex. Loc. Gov’t Code Ann. § 361.082 (West); Vt. Stat. Ann. tit. 28, § 801a (West); N.Y. Correct. Law § 611 (McKinney); Colo. Rev. Stat. Ann. § 17-1-113.7 (West 2006); Wash. Rev. Code Ann. § 72.09.651 (West).

⁹⁵ N.M. Stat. Ann. § 33-1-14.2 (West, Westlaw current through the end of the Second Regular Session of the 53rd Legislature).

of restraints to be imperative to the success of implementation of this type of legislation.

C. FEDERAL LEGISLATION

i. Federal Bureau of Prisons

In 2008, the Federal Bureau of Prisons (“FBOP”) instituted policy against shackling pregnant inmates.⁹⁶ However, the FBOP only exclusively banned the use of belly chains.⁹⁷ With regard to such other restraints as handcuffs and leg shackles, the FBOP left the decision to the discretion of prison officials.⁹⁸ This discretion is not unqualified, however, and restraints are generally not considered necessary unless the inmate poses a significant risk of harm or a risk of escape.⁹⁹ These exceptions are analogous to those in state legislation discussed above.

ii. Congress

On July 11, 2017, the Dignity for Incarcerated Women Act (the “Dignity Act”) was introduced in the Senate and referred to the Committee on the Judiciary.¹⁰⁰ Sponsored by Senator Cory Booker, along with Senators Elizabeth Warren, Richard Durbin, and Kamala Harris, the bill would mandate significant changes in multiple areas concerning health care and basic rights for incarcerated women.¹⁰¹ In particular, it calls for a complete ban on the use of restraints on pregnant women:

“A Federal penal or correctional institution may not use instruments of restraint, including handcuffs, chains, iron, straitjackets, or similar items, on a prisoner who is pregnant.”¹⁰²

Thus, the bill includes none of the exceptions that most state statutes, court opinions, and model bills do, nor does it provide for detainees. Although admirable in its attempt to institute a complete ban on the use of restraints on pregnant federal inmates, the bill is unlikely to pass without at least some exceptions to the blanket rule. The perception that inmates may be dangerous and may attempt

⁹⁶ FED. BUREAU OF PRISONS, PROGRAM STATEMENT: ESCORTED TRIPS, NO. 5538.05, at 11(a) (Oct. 6, 2008), http://www.bop.gov/policy/progstat/5538_07.pdf.

⁹⁷ *Id.*

⁹⁸ *Id.* at § 570.44.

⁹⁹ *Id.*

¹⁰⁰ *See supra* note 1.

¹⁰¹ *Id.*

¹⁰² *Id.* at § 4050(d)(2).

escape if left unrestrained is too pervasive for a complete ban to pass a bipartisan Congress.

III. ANALYSIS

A. **Leading health and civil rights organizations, as well as the United Nations, oppose shackling pregnant inmates.**

The American Congress of Obstetricians and Gynecologists (“ACOG”), one of the leading voices against the use of restraints on pregnant incarcerated women, has listed multiple ways in which the imposition of restraints might harm both the mother and her child.¹⁰³ The complete ACOG table listing some of the various potential consequences associated with shackling is reproduced on the last page of this Note and includes such medical risks as: heightened risk of falling and lessened ability to break a fall; hindered ability of medical professionals to examine the woman in labor; increased risk of injury if the mother suffers from seizures brought on by preeclampsia; decreased ability to move around in order to alleviate pain; and hindered ability of medical professionals to prepare the woman for emergency situations such as a cesarean delivery.¹⁰⁴

The ACOG has acknowledged that the FBOP, US Marshals Service, and other organizations have established policies against shackling, but “[t]hese standards serve as guidelines and are voluntary, not mandatory. State and local prisons are not required to abide by either the Federal Bureau of Prisons policy or the National Commission on Correctional Health Care standards...”¹⁰⁵ Without mandatory requirements for jails and their staff, the basic rights of American women will continue to be infringed upon.

The American Medical Association (“AMA”) has also lent its voice to those speaking against the use of restraints during pregnancy. The AMA’s Advocacy Resource Center formulated a report on the use of shackles on pregnant inmates in 2015, finding no justified reason to continue the custom.¹⁰⁶ Not only did the AMA point out that “[t]he vast majority of female prisoners or detainees are ... non-violent offenders,” it also found that “[w]hile states

¹⁰³ *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, Comm. Op. No. 511, at 3-4, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (2011), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co511.pdf?dmc=1&ts=20180628T1710410017>

¹⁰⁴ *Id.* at 3.

¹⁰⁵ *Id.*

¹⁰⁶ *An “Act to prohibit the shackling of pregnant prisoners” model state legislation*, at 1, AM. MEDICAL ASSOC. (2015), <https://www.ama-assn.org/sites/default/files/media-browser/specialty%20group/arc/shackling-pregnant-prisoners-issue-brief.pdf>.

justify using restraints to prevent escapes, no women in labor have ever attempted escape.”¹⁰⁷ At its 2010 Annual Meeting, the AMA “adopted policy condemning the practice of shackling pregnant prisoners” and recommended the AMA formulate a model bill.¹⁰⁸ In so doing, the AMA expressed approval of New Mexico’s anti-shackling statute (reproduced above).¹⁰⁹ In its model legislation, the AMA provided for the very same exceptions that most states and courts have encouraged – significant risk of harm and risk of escape – and considers these to be rare occasions.¹¹⁰ However, “[t]he AMA model state legislation extends the shackling prohibition to the second and third trimester due to safety risks shackling poses to pregnant women...”¹¹¹ Thus, the AMA model legislation is slightly more comprehensive than those employed by most states.

The American Civil Liberties Union (“ACLU”) has also worked to end the practice of restraining pregnant inmates and detainees. According to the ACLU, the risk of adverse consequences of shackling a pregnant mother are unacceptable both to the pregnant woman and to her child.¹¹² In its own words, “Shackling pregnant women is dangerous and inhumane. Although widely regarded as an assault on human dignity as well as an unsafe medical practice, women prisoners are still routinely shackled during pregnancy and childbirth.”¹¹³ The ACLU does not take this issue lightly, as evidenced by their representation of Shawanna Nelson in her fight for justice.¹¹⁴ Like the AMA, the ACLU reported that not one state with a policy or statute against the use of shackles had “reported any escapes or threats to medical or correctional staff from pregnant prisoners since prohibiting shackling.”¹¹⁵ Further, the ACLU categorizes the practice as “degrading, unnecessary, and a violation of human rights.”¹¹⁶

Perhaps most persuasive, the United Nations itself has adopted anti-shackling rules in its Standard Minimum Rules for the Treatment of Prisoners, which were renamed as the Nelson Mandela Rules in December 2015.¹¹⁷ The rule states: “Instruments of restraint

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.* at 1.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 4.

¹¹¹ *Id.* at 2.

¹¹² *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*, at 1, AM. CIVIL LIBERTIES UNION (OCT. 10, 2012), https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf.

¹¹³ *Id.*

¹¹⁴ *Id.* at 3.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.* at 1.

¹¹⁷ See G.A. Res. 70/175, annex, Nelson Mandela Rules, (Dec. 17, 2015); U.N. Office on Drugs and Crime, *The Nelson Mandela Rules, an updated Guide for*

shall never be used on women during labour, during childbirth and immediately after childbirth.”¹¹⁸ The United States of America is a member of the United Nations, and as a member, is charged with an obligation to “promote solutions of international economic, social, health, and related problems” (emphasis added).¹¹⁹ These standard rules formulated by the UN were considered by that body to be necessary in order to advise Member States on “good principles and practice in the treatment of prisoners and prison management.”¹²⁰ However, the United States clearly has not taken this crucial portion of the Nelson Mandela Rules seriously. America cannot truly be considered a protector of human rights unless and until it implements such standard minimum rules outlined by the Nelson Mandela Rules for the treatment of pregnant female inmates and detainees.

B. *Martin v. County of Milwaukee, et al.*

In 2013, Shonda Martin was pregnant and became incarcerated in the Milwaukee County Jail.¹²¹ Martin was subjected to horrific sexual assault during this time by Officer Thicklen, one of the employees at the jail.¹²² Not only did he assault her while she was pregnant, he immediately resumed his attacks after she delivered her baby.¹²³

As if not enough for Martin to be subjected to abuse by Officer Thicklen, Martin was also shackled by one wrist and one leg restraint throughout labor.¹²⁴ Only the leg restraint was removed while Martin delivered her child.¹²⁵ Martin’s case was tried by a jury in July of 2017. As to her Fourteenth Amendment Due Process claims for the sexual assault committed against her by Officer Thicklen, the jury awarded her \$6.7 million.¹²⁶ However, as to her shackling claim, the jury awarded her nothing.¹²⁷

Martin’s failure to exact justice on her shackling claim stems from the tactics employed by her counsel. In her original complaint,

Prison Management in line with Human Rights,
https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf (last visited Jan. 6, 2018).

¹¹⁸ G.A. Res. 70/175, annex, at 48(2), Nelson Mandela Rules, (Dec. 17, 2015).

¹¹⁹ U.N. Charter art. 55, ¶ 1(b).

¹²⁰ See G.A. Res. 70/175, *supra* note 106, Preliminary observation 1.

¹²¹ First Amended Complaint at 3, *Martin v. County of Milwaukee, et al.*, No. 2:14-cv-00200 (E.D. Wis. 2014).

¹²² *Id.* at 3-8.

¹²³ *Id.* at 6-7.

¹²⁴ *Id.* at 10.

¹²⁵ *Id.*

¹²⁶ Amended Judgment at 1, *Martin v. County of Milwaukee, et al.*, No. 2:14-cv-00200 (E.D. Wis. 2014).

¹²⁷ *Id.* at 2.

Martin categorized the use of restraints during her pregnancy as an Eighth Amendment violation.¹²⁸ However, in her amended complaint, Martin categorized her claim as a Fourteenth Amendment Due Process violation.¹²⁹ The flaw lies here. Because she relied on the Fourteenth Amendment for this claim, the test employed by the court was different. Whereas an Eighth Amendment claim requires a complainant to demonstrate that an official was deliberately indifferent to a serious medical need, Martin's Fourteenth Amendment claim required her to demonstrate that the jail had a policy that was not reasonably calculated to achieve a legitimate goal, and as a result of this policy, Martin suffered harm.¹³⁰ Although the jury did find that the use of shackles was not reasonably calculated to achieve a legitimate purpose, it also determined that Martin had not suffered any harm.¹³¹ This is arguable in itself, as Martin most likely did suffer some extent of mental and emotional harm as a result of being shackled throughout labor, delivery, and postpartum recovery. However, considering the practically identical facts between Martin and the cases discussed previously – *Women Prisoners*, *Nelson*, *Brawley*, and *Villegas* – Martin almost assuredly would have prevailed if she had brought the proper Eighth Amendment claim. The error here lies with the choices made by her counsel.

It is important to note that shackling is an Eighth Amendment violation, and that a jury specifically found it did not breach Martin's Fourteenth Amendment Due Process rights.¹³² Had pregnant inmates' right to be free from shackling been established as a principle protected by Due Process, it would have automatically been recognized across the country.¹³³ No state would be able to infringe upon this basic right of female prisoners.¹³⁴ However, because it was not a Fourteenth Amendment right under substantive due process, it is necessary for the federal government to enact legislation to keep shackling from being used against pregnant female prisoners and detainees in federal prisons. Additionally, it is necessary for states to enact prohibitory legislation in order to protect state and local inmates.

Despite Martin's loss with regard to the unconstitutional use

¹²⁸ Complaint at 10, *Martin v. County of Milwaukee, et al.*, No. 2:14-cv-00200 (E.D. Wis. 2014).

¹²⁹ First Amended Complaint at 10-11, *Martin v. County of Milwaukee, et al.*, No. 2:14-cv-00200 (E.D. Wis. 2014).

¹³⁰ Jury Instructions at 17, *Martin v. County of Milwaukee, et al.*, No. 2:14-cv-00200 (E.D. Wis. 2014).

¹³¹ Amended Judgment at 2, *Martin v. County of Milwaukee, et al.*, No. 2:14-cv-00200 (E.D. Wis. 2014).

¹³² *Id.*

¹³³ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

¹³⁴ See *id.*

of shackling during her pregnancy, this case is important to demonstrate that this problem is tangible and continually existent in the United States. Martin's case is analogous to those which came before, proving that the policy and practice is widespread. Without legislation to prevent this practice from occurring, the basic human rights of these already underprivileged women will continue to be infringed. As a result, not only will the health of the mother be endangered, but the health and life of her unborn child.

IV. ARGUMENT

An examination of the cases involving shackling claims of pregnant inmates and detainees might suggest that it is agreed and established that shackling is wrong.¹³⁵ From that conclusion, one could naturally assume that because it is an established constitutional violation, the federal and state governments would take steps to prevent similar instances from occurring. However, only 22 states have implemented legislation protecting female prisoners from this practice.¹³⁶ Senator Cory Booker, one of the proponents of the Dignity for Incarcerated Women Act, blames this absence of action on a lack of discourse surrounding the practice.¹³⁷ This lack of dialogue must be remedied, because in reality, the facts are these:

- 60% of women in state prisons were previously victims of abuse.¹³⁸
- The overwhelming majority of women arrested are taken into custody for non-violent offenses. In fact, violent offense arrests constituted only 17% of women arrested in 1998.¹³⁹
- Overall, women account for only about 14% of violent offenders. Men count for almost 6 times this number.¹⁴⁰
- Of female violent offenders, 75% committed mere simple

¹³⁵ See cases cited *supra* note 5.

¹³⁶ See *supra* note 7.

¹³⁷ Senators Booker, Warren, Durbin, Harris Introduce Landmark Bill to Reform the Way Women Are Treated Behind Bars, ELIZABETH WARREN: U.S. SENATOR FOR MASS. (July 11, 2017), https://www.warren.senate.gov/?p=press_release&id=1727.

¹³⁸ Lawrence A. Greenfield & Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, Women Offenders at 1 (1999), *available at* <https://www.bjs.gov/content/pub/pdf/wo.pdf>.

¹³⁹ *Id.* at 5.

¹⁴⁰ *Id.* at 1.

assault.¹⁴¹

- Approximately 950,000 women were involved with the criminal justice system in 1998. In other words, 1 out of every 109 adult American women.¹⁴²
- An estimated 6% of women committed to local jails were pregnant at the time, and an estimated 5% of women committed to state prisons were pregnant when admitted.¹⁴³
- Approximately 3% of women in local jails received prenatal care once admitted, compared to about 4% of women in state prisons.¹⁴⁴

The number of women in the criminal justice system continues to increase.¹⁴⁵ The vast majority of these women are non-violent offenders.¹⁴⁶ In addition, a majority have been past victims of physical or sexual abuse.¹⁴⁷ Our criminal justice system receives these women, commits them to confinement, and then shackles them to their wheelchairs and hospital beds while they give birth to their children, as if they were no better than animals. This method of punishment – cruel and unusual punishment to be precise – shows them that not only were they worthless in the minds of those who abused them, but they are also worthless in the eyes of the criminal justice system, those employed by the criminal justice system, and the greater American people.

Although it might at first seem like common sense to allow a woman to be free from restraint during such a critical time as labor, delivery, and postpartum recovery, the preceding cases demonstrate that this is not the truth. In order to protect the rights of these women, who themselves may not be able to adequately defend their cause, we must ensure that this practice is banned, and that those who breach this ban will be liable for the human rights violation they have committed. The incarcerated women who suffer these instances of punishment are themselves serving time in order to establish justice for their wrongs. It is only fitting and in conformity with American principles of justice that those who commit offenses against these women are also held liable for their actions.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 8.

¹⁴⁴ *Id.*

¹⁴⁵ Aleks Kajstura & Russ Immarigeon, *States of Women's Incarceration: The Global Context*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/global/women/> (last visited Jan. 6, 2018).

¹⁴⁶ Greenfield & Snell, *supra* note 138 at 5.

¹⁴⁷ *Id.* at 1.

Further, as explained by the ACOG, the policies implemented by the FBOP, US Marshals Service, and similar institutions are insufficient to guard women in either federal prisons or in state prisons.¹⁴⁸ This is because they are not mandatory standards, but merely suggest appropriate conduct.¹⁴⁹ In order to protect female inmates and detainees from the use of shackles throughout the course of pregnancy, mandatory provisions, i.e., state and federal legislation, must be put in place to more effectively regulate the conduct of those overseeing these women.¹⁵⁰

However, as the courts and others have found, the right to be free from restraint is not and should not be unqualified. This Note recognizes that there are certain *rare* but necessary circumstances in which restraints might be used, and recommends that all states and the federal government enact legislation banning the practice of shackling pregnant inmates similar to that employed by New Mexico.¹⁵¹ Yet, a few necessary changes should be made to this statute.

First, the “compelling grounds” on which an inmate might be subjected to the use of restraints should be defined. Such definition should include a non-exhaustive but exemplary list of the unusual circumstances that might justify the use of restraints. In addition, if one of those compelling grounds is found by a prison official, the official should seek the agreement of at least two other prison officials as to whether or not restraints should be utilized. Further, any use of restraints as a result of one of the compelling grounds should be documented in a report submitted by the official, and signed by the two officials who agreed restraints should be utilized.

Second, section (B), which allows for the least restrictive restraints necessary if a pregnant inmate or detainee is shackled, should be amended to prohibit all use of restraint during delivery of the child. The potential health risks and the woman’s interest in being free from restraints during the intense stress of childbirth are such that restraints should never be used during this time.

Third, the statute should expressly provide for the liability of those who breach a woman’s constitutional right to be free from restraint during pregnancy. An inmate’s right to be free from the use

¹⁴⁸ *Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, Comm. Op. No. 511, at 4, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (2011), available at <https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females>.

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ N.M. Stat. Ann. § 33-1-4.2 (West, Westlaw current through the end of the Second Regular Session of the 53rd Legislature).

of restraints and therefore from cruel and unusual punishment should not be taken lightly. It is necessary to notify those that might engage in restraining a pregnant inmate that they could potentially face liability for their actions in order to ensure the end of this practice.

In formulating anti-shackling legislation, it is recommended that legislators examine the American Medical Association's model bill titled "An Act to Prohibit the Shackling of Pregnant Prisoners."¹⁵² The model bill provides:

"Section 4. Requirements. Restraint of Prisoners and Detainees

- (a) An adult or juvenile correctional institution shall use the least restrictive restraints necessary when the correctional institution has actual or constructive knowledge that a prisoner or detainee is in the second or third trimester of pregnancy. No restraints of any kind shall be used on a prisoner or detainee during labor, transport to a medical facility, delivery, and postpartum recovery unless there are compelling grounds to believe that the prisoner or detainee presents:
 - (1) an immediate and serious threat of harm to herself, staff or others; or
 - (2) a substantial flight risk and cannot be reasonably contained by other means.
- (b) Under no circumstances shall leg or waist restraints be used on any prisoner or detainee who is in labor or delivery.
- (c) If restraints are used on a prisoner or detainee pursuant to subsection (a), the corrections official shall make written findings within ten (10) days as to the extraordinary circumstance that dictated the use of the restraints to ensure the safety and security of the prisoner or detainee, the staff of the correctional institution or medical facility, other prisoners or detainees, or the public. These findings shall be kept on file for at least five (5) years

¹⁵² *An Act to Prohibit the Shackling of Pregnant Prisoners*, AM. MED. ASSOC.: ADVOCACY RESOURCE CENTER (Oct. 2010), <https://www.ama-assn.org/sites/default/files/media-browser/specialty%20group/arc/shackling-pregnant-prisoners-model-bill.pdf>.

and be made available for public inspection, except that no information identifying any prisoner or detainees shall be made public in violation of [insert relevant section] without the prisoner or detainee's prior written consent.

Section 5. Enforcement. Notice to Prisoners and Detainees

- (a) Within 30 days of the effectiveness of this Act, all correctional institutions in [State] shall develop rules pursuant to this Act.
- (b) Correctional institutions shall inform prisoners and detainees of the rules developed pursuant to subsection (a) upon admission to the correctional institution and ... post policies or practices pursuant to this Act in locations in the correctional institution where such notices are commonly posted, including common housing areas and medical care facilities.
- (c) Within 60 days of the effectiveness of this Act, correctional institutions shall inform prisoners and detainees within the custody of the correctional institution of the rules developed pursuant to subsection (a)."¹⁵³

The AMA's model bill provides for many of the suggestions made by this Note. However, the language of the model bill should be altered to provide for those recommendations not included by the AMA. For example, "compelling grounds" should be defined in the definitions section of the statute. The definition should include a non-exhaustive but exemplary list of the rare circumstances which might allow for the use of restraints. Also, section (b) of the bill should be amended so that leg or waist restraints may not be used at any time during a woman's pregnancy. Nonetheless, taken as a whole, the AMA's model bill is a good example of model legislation for states and the federal government to consider when enacting anti-shackling statutes.

V. CONCLUSION

Although it presents itself as the "land of the free," America's reputation does suffer from more than one example of human rights abuse. One such abuse is the use of restraints on

¹⁵³ *Id.*

pregnant inmates and detainees. This practice has been denounced by the United Nations, by the Federal Bureau of Prisons, by multiple United States courts, and by multiple states.¹⁵⁴ However, as evidenced by *Martin v. County of Milwaukee*, the practice still persists. In order to end this violation of the Eighth Amendment to the Constitution of the United States and protect the rights of these already underprivileged women, it is necessary for both the federal government and individual state governments to enact legislation banning the practice. Not only must the practice be banned, anti-shackling legislation must provide for the liability of those who breach a woman's right to be free from restraint during pregnancy, labor, delivery, and postpartum recovery. America cannot attempt to establish principles of freedom and justice throughout the rest of the world if those same principles are not recognized and protected at home.

¹⁵⁴ See G.A. Res. 70/175, annex, at 48(2), Nelson Mandela Rules, (Dec. 17, 2015); FED. BUREAU OF PRISONS, PROGRAM STATEMENT: ESCORTED TRIPS, NO. 5538.05, at 11(a) (Oct. 6, 2008), *available at* http://www.bop.gov/policy/progstat/5538_07.pdf; *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563 (6th Cir. 2013); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009); *Brawley v. Washington*, 712 F. Supp. 2d 1208 (W.D. Wash. 2010); *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, *et al.*, 877 F. Supp. 634 (D.D.C. 1994); *2017 ACOG State Legislation Tally*, Am. Cong. of Obstetrics and Gynecology (Mar. 2018), <https://www.acog.org/-/media/Departments/State-Legislative-Activities/2017ShacklingTally.pdf?dmc=1&ts=20171029T2052480513>.

Box 2. Examples of the Health Effects of Restraints

Nausea and vomiting are common symptoms of early pregnancy. Adding the discomfort of shackles to a woman already suffering is cruel and inhumane.

It is important for women to have the ability to break their falls. Shackling increases the risk of falls and decreases the woman's ability to protect herself and the fetus if she does fall.

If a woman has abdominal pain during pregnancy, a number of tests to evaluate for conditions such as appendicitis, preterm labor, or kidney infection may not be performed while a woman is shackled.

Prompt and uninhibited assessment for vaginal bleeding during pregnancy is important. Shackling can delay diagnosis, which may pose a threat to the health of the woman or the fetus.

Hypertensive disease occurs in approximately 12-22% of pregnancies, and is directly responsible for 17.6% of maternal deaths in the United States. Preeclampsia can result in seizures, which may not be safely treated in a shackled patient.

Women are at increased risk of venous thrombosis during pregnancy and the postpartum period. Limited mobility caused by shackling may increase this risk and may compromise the health of the woman and the fetus.

Shackling interferes with normal labor and delivery:

- The ability to ambulate during labor increases the likelihood for adequate pain management, successful cervical dilation, and a successful vaginal delivery.
- Women need to be able to move or be moved in preparation for emergencies for labor and delivery, including should dystocia, hemorrhage, or abnormalities of the fetal heart rate requiring intervention, including urgent cesarean delivery.

After delivery, a healthy baby should remain with the mother to facilitate mother-child bonding. Shackles may prevent or inhibit this bonding and interfere with the mother's safe handling of her infant.

As the infant grows, mothers should be part of the child's care (ie, take the baby to child wellness visits and immunizations) to enhance their bond. Shackling while attending to the child's health care needs may interfere with her ability to be involved in these activities.

¹⁵⁵ See *supra* note 148.